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Mr Jonathan Bower  
Partner  
Womble Bond Dickinson (UK) LLP

Your Ref: KD10/JCB1/DEP/0009.17

Our Ref: BC080001/CAPP-0013B  
(Comb)

**By Email**

Date: 26 May 2022

Dear Mr Bower

## **Planning Act 2008 (as amended) – Section 95**

### **Application by Womble Bond Dickinson for the Secretary of State for Transport (Mr Nick Lambert) for an award of costs: against London Resort Company Holdings Limited regarding an Application for an Order Granting Development Consent for the London Resort**

1. By a submission dated 25 April 2022, Mr Nick Lambert, Deputy Director, Head of Property Portfolio and Advisory, Corporate Finance & Property Directorate in the Department for Transport on behalf of the Secretary of State for Transport ("SoST") has made an application for an award of costs ("the costs application") against the London Resort Company Holdings Limited ("the respondent party") regarding its Application for an Order Granting Development Consent for the London Resort ("the Order"). The costs application has been published and can be seen in the Examination Library [CAPP-013].
2. On 3 May 2022, I wrote to Mr Lambert, seeking clarification of the following matters (in summary):
  - whether there was any overlap between the costs claim by the SoST and another costs claim [CAPP-002] by DLA Piper LLP on behalf of National Highways; and
  - the plots in respect of which the SoST relies to establish their standing as an Affected Person and a 'successful objector'.

Correspondence from Mr Jonathan Bower of Womble Bond Dickinson for SoST on 16 May 2022 ('your correspondence') addresses those points and confirms that you now act for SoST. This letter is therefore to confirm that consideration of the costs application submitted on behalf of the SoST by Mr Lambert will now proceed.

3. The Examining Authority (ExA) appointed to examine the Order is empowered to make awards of costs against relevant parties in respect of the examination of a Nationally Significant Infrastructure Project (NSIP). The power to award costs under section (s) 250(5) of the Local Government Act 1972 is applied to an

examination of an application for a development consent order ('DCO') by s95(4) of the Planning Act 2008 (PA2008).

4. The then Secretary of State for Communities and Local Government has published guidance on costs applications in relation to DCO examinations ("the Costs Guidance"). It can be accessed by following this link: [Award of costs: examinations of applications for development consent orders - Guidance \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/guidance/award-of-costs-examinations-of-applications-for-development-consent-orders)
5. On 7 April 2022, the Planning Inspectorate provided advice under section 51 of the Planning Act 2008 in relation to previous costs decisions taken on the Atlantic Array application, which is available via the [National Infrastructure Planning Website landing page](#) for the London Resort.
6. Further to the statutory powers outlined above, to the Costs Guidance and having had regard to the approach taken to previous costs decisions identified in the section 51 advice, I am writing to inform you that the ExA has given preliminary consideration to the costs application in two parts and notes that it is based on:
  - the status of the SoST as an Affected Person ('**the first part**'); and
  - an allegation of unreasonable behaviour by the respondent party ('**the second part**').

This letter continues to set out the process under which a decision will be taken on the costs application.

7. In relation to the validity of **the first part** of the costs application that you have submitted, the ExA has considered the Costs Guidance, referring specifically to all paragraphs in Part D. The ExA notes the basis of this costs application as being that the SoST considers themselves to be a 'successful objector' and therefore that it is not necessary for unreasonable behaviour by the respondent to be demonstrated. On the basis that the SoST appears to the ExA to be an Affected Person, that the application for the Order has been withdrawn and so the SoST also appears to be a 'successful objector' and that the costs application was made within 28 days of the withdrawal of the application for the Order and so is timely, the ExA has agreed to consider the first part of the costs application. In reaching this view, the ExA notes specifically that whilst the examination of the London Resort application had not commenced at the point where the application was withdrawn, previous costs decisions in relation to Planning Act 2008 casework by the ExA for the Atlantic Array demonstrate acceptance of the principle that costs may be applied for in circumstances where an application is withdrawn in the period between acceptance for Examination and the Preliminary Meeting. The ExA here sees the approach taken by the ExA for the Atlantic Array as being relevant and applicable to the circumstances of your application for costs.
8. In relation to the validity of **the second part** of the costs application, the ExA notes that it was made within 28 days of the withdrawal of the application for the Order and so is timely. However, the ExA has not reached a concluded position on the question of whether it has jurisdiction to consider the second part of the costs application. This part relies on an allegation of unreasonable behaviour. It is based on the SoST's standing as an Interested Party. Whilst there are circumstances (including those in respect of which the section 51 advice referred

to in paragraph 4 above was given) in which successful objector costs claims can arise in the time prior to a Preliminary Meeting, further to paragraph 12 of the Costs Guidance, it is not clear that costs for unreasonable behaviour can do so, but neither are such claims conclusively excluded. It follows that there is a question in relation to jurisdiction over the second part that must be decided before a decision is taken on the merits of this part of the costs application that you have made.

9. Nine Affected Persons have made submissions that rely on both the standing of the costs applicant as an Affected Person and on allegations of unreasonable behaviour [CAPP-006, 011, 013, 014, 015, 017, 018, 019 and 020]. To the extent that these applications for costs also argue that unreasonable behaviour claims can be made in relation to matters arising before a Preliminary Meeting, then they raise considerations that are relevant to the question of jurisdiction. Five Interested Parties have made submissions that rely on allegations of unreasonable behaviour alone and argue that such claims can validly be made in relation to matters arising before a Preliminary Meeting [CAPP-003, 004, 007, 009 & 010]. Aspects of these submissions are also relevant to the jurisdiction question as to whether such claims can be made. All of the documents referred to above are available on the [National Infrastructure Planning Website documents tab](#).
10. In accordance with paragraph 34 of the Costs Guidance and for the reasons set out above, the ExA has decided to address the 'successful objector claim', the jurisdiction question and the question of whether the respondent party's behaviour satisfies the necessary tests for unreasonable behaviour in a rolled-up procedure. The ExA has asked me to write to the respondent party today (copy attached), providing them with an opportunity to make any observations on the following matters:
  - **Matter 1:** the 'successful objector' claim for costs, and specifically whether there are any arguments that, if successful, a part award should be made that would be different to or lesser in extent than any award that could possibly be made under matter 3;
  - **Matter 2:** the jurisdiction to award costs for unreasonable behaviour in these circumstances, and without prejudice to this matter;
  - **Matter 3:** the unreasonable behaviour alleged in the costs application and whether it meets the test for an award set out in the Costs Guidance.

The respondent has been asked to reply within 21 calendar days<sup>1</sup> (by **16 June 2022**).

11. In relation to each matter, you are asked to note that the same costs cannot be claimed twice. The ExA has asked me to advise you that if (for example) you were to be successful in your claim for costs under matter 1 to an extent that amounts to an equal or greater proportion of costs than those that might (for example) be awarded under matter 3, you would not be able to additionally claim those costs were you also to be successful in matter 3.
12. If the respondent party elects to respond, copies of the response on each matter responded to will be provided to you shortly after they have been received by the

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<sup>1</sup> Deadlines in Costs procedures are normally set at 14 calendar day intervals. An extended deadline has been provided on this occasion in recognition of the Queen's Platinum Jubilee.



ExA. I will then provide you with an opportunity to make your final observations to the ExA in writing, within a further 14 calendar days. I will write to you again if needs be, to advise you of that start and end of that period.

13. Following receipt of your final observations (or the expiry of the deadline if no such submissions are made), the ExA will proceed to decide the costs application, the outcome of which will be communicated to you in writing.
14. All correspondence relating to the costs applications will be published on the National Infrastructure Planning Website following the costs decision by the ExAs.
15. If you have any questions about this letter, please do not hesitate to contact me.

Yours sincerely

Edwin Mawdsley  
**Case Manager**

cc The Respondent Party